No. 90-1098
No. 90-1099

In The
Supreme Court of the United States
October Term, 1990

STATE OF MINNESOTA,

Respondent,

vs.

JEFFREY SCOTT BUSWELL,
GARY LEE SCHWARTZMAN,

Petitioners.

Petition For A Writ Of Certiorari To The Supreme Court of Minnesota

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the search of petitioners' vehicle by private security personnel at the entrance to a private business, Brainerd International Raceway, was a private search not subject to limitation by the Fourth and Fourteenth Amendments to the United States Constitution?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petitions for writ of certiorari herein seeking review of the Minnesota Supreme Court's opinion in this case.

THE OPINION BELOW

Petitioners seek a writ of certiorari to review the judgment and opinion of the Supreme Court of Minnesota in *State v. Buswell*, 460 N.W.2d 614 (Minn. 1990), *reh. denied* (Minn. Oct. 8, 1990).

STATEMENT OF THE CASE

These are consolidated illegal drug cases in which petitioners, on March 9, 1989, were found guilty after a court trial of possession of controlled substances in violation of Minnesota law. The evidence upon which petitioners were convicted was developed as the result of a search of their vehicle by private security personnel at an entryway to Brainerd International Raceway (hereinafter "BIR") on or about August 18, 1988.

Unfortunately, in their petitions' respective statements of the case petitioners have chosen to ignore this Court's adjuration to present a "concise" statement containing only "the *facts* material to the consideration of the questions presented." U.S. Sup. Ct. Rule 14.1(g) (emphasis added). Pages 5-9 of both petitions go far beyond the facts and procedural history of the case to present purely argumentative material, complete with case citations. These pages contain no facts, but only conclusory assertions unsupported by any reference to the record.

Further, petitioners' statements of the case fail to mention certain important facts which the Minnesota Supreme Court found to be material. For example, nowhere do petitioners mention that BIR is a private business operating a racetrack on private property in Crow Wing County, about six miles outside the city limits of Brainerd, Minnesota (O.H. 12).[1] Nor do petitioners make clear that security for the raceway is provided by

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[1] "O.H." refers to the transcript of the consolidated omnibus hearing held on October 3, 1988.

means of a private contract between BIR and a private company called North Country Security owned by Keith Emerson (O.H. 12).

While petitioners do correctly state that Mr. Emerson is "a City of Brainerd police officer and a special deputy for the Crow Wing County Sheriff's Office." (Petitions at 5); they fail to point out the fact that his special deputy status gave Emerson no independent power to arrest outside the city limits of Brainerd except as directed by the Sheriff or a regular deputy (O.H. 35).[2]

The complete facts of this case show that BIR paid North Country a set figure for security on any given race weekend (O.H. 15). North Country's responsibility was to hire security guards and manage the security arrangements (O.H. 15-17). For this particular weekend approximately 127 guards were employed, only six or seven of which were police officers in any capacity, and none were from jurisdictions covering BIR (O.H. 23-25).

Prior to the racing season, in May 1988, Mr. Emerson had conferred in general terms with the Crow Wing County Sheriff and a local BCA agent as to what procedures would be employed if his security guards uncovered illegal activity (O.H. 26-27). But contrary to petitioners' characterization of this meeting, the record shows it was only agreed that if any incident encountered by BIR security guards seemed to warrant an arrest, the call would go first to Emerson who, after reviewing the

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[2] This particular fact was deemed important enough by the Minnesota Supreme Court to be mentioned twice in its opinion. *State v. Buswell*, 460 N.W.2d 614, 615 and 620 (Minn. 1990).

situation, would then decide whether to call in law enforcement (O.H. 28-29). Contrary to the assertion by petitioners (Petitions at 5), no agreement was made with either the Sheriff or BCA as to the type or number of searches conducted by BIR security personnel (O.H. 16, 17). Further, no law enforcement personnel were assigned to be present at BIR (O.H. 31-32, 116).

One responsibility of North Country Security at BIR was to search entering vehicles to insure that only ticket holders would enter the raceway (O.H. 19-22). This was done by stopping the vehicles about 50 feet from the main gate and entering the vehicles to look for any stowaways (O.H. 20-21).

On the morning of August 18, 1988, a number of vehicles were lined up to enter the gate when it opened. Numerous vehicles, including petitioners', were searched by security guards prior to entry. The primary reason for the search was to determine whether any unpaid persons were attempting to enter the raceway (O.H. 21-22, 75-76). Another reason was to keep illegal drugs, mopeds, and other prohibited items out of BIR (O.H. 77, 89-90).

The North Country Security guard who actually searched petitioners' vehicle was Bruce Gateley (O.H. 29). Mr. Gateley was not a licensed peace officer (O.H. 29), but on the day in question was wearing North Country's standard uniform and was carrying a sidearm and handcuffs (O.H. 22-23, 84).

When petitioners' vehicle approached Gateley motioned for them to stop in front of the BIR gate, informed the driver of the purpose of the search, and

then proceeded to search the inside of the vehicle (O.H. 75-79).

When Gateley discovered the controlled substances in question he informed Emerson, and law officers were notified (O.H. 29-30, 80). The officer who was eventually notified and responded to the call, Crow Wing County Deputy David Bjerga, was a long way from BIR property when he was asked to report to the raceway (O.H. 116). When Deputy Bjerga and other officers arrived, they were informed by security personnel that controlled substances were inside the vehicles (O.H. 117-120). Further investigation led to the arrest and conviction of petitioners.

A direct appeal was taken to the Minnesota Court of Appeals which reversed the drug convictions of petitioners and remanded for further proceedings. *State v. Buswell*, 449 N.W.2d 471 (Minn. Ct. App. 1989). The State petitioned for further review and on August 30, 1990, the Minnesota Supreme Court reversed the Court of Appeals and reinstated the judgments of conviction. *State v. Buswell*, 460 N.W.2d 614 (Minn. 1990).

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

A writ in this case is neither necessary nor warranted because there exist no "special and important reasons" for the exercise of this Court's discretionary power of review. U.S. Sup. Ct. Rule 10.01. The Minnesota Supreme Court correctly held that the question presented herein is a fact specific issue "to be decided on a case-by-case basis

after consideration of all the facts and circumstances relative to the search." *State v. Buswell*, 460 N.W.2d 614, 618 (Minn. 1990). This was based on the recent decision by this Court in *Skinner v. Railway Executives Ass'n*, 489 U.S. 602, 614 (1989); a case which petitioners neglected to cite in their petitions.

Further, the basic parameters for determining when private searches are subject to the exclusionary rule have already been established by this Court in a long line of decisions extending from *Skinner* back through *Burdeau v. McDowell*, 256 U.S. 465 (1921). The Minnesota Supreme Court correctly applied these principles to the particular facts of this case. Far from being in conflict with the decisions of any federal circuit on this issue, the Minnesota Supreme Court expressly cited and incorporated the various decisions of the federal circuits into its own opinion. *Buswell*, 460 N.W.2d at 618-20. Accordingly, the petitions for writ herein can properly be denied.

II. NO SUBSTANTIAL FEDERAL QUESTION IS RAISED WHERE RESOLUTION OF THIS PRIVATE SEARCH CASE IS DEPENDENT UPON ITS OWN SINGULAR FACTS.

The factually unique nature of this case precludes it from presenting any substantial federal question as defined by this Court. As Justice Frankfurter wrote for the Court in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955):

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not

> sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted]. *'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.*

Id. at 74 (emphasis added).

The question presented herein is so based on the particular facts of this case as to be deemed merely "academic" or "episodic" in nature.

It has long been settled that the Fourth and Fourteenth Amendments are limitations only upon government activity, and that private searches, even unreasonable or arbitrary ones, are not unconstitutional. *Skinner*, 489 U.S. at 614; *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984); *Burdeau*, 256 U.S. at 475.

As to what constitutes a "private" search, this Court has already established in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) that:

> The test . . . is whether [the private citizen], in light of all the circumstances of the case, must be regarded as having acted as *an 'instrument' or agent of the state* when she provided her husband's belongings.

Id. at 487 (emphasis added). This determination "turns on the degree of the Government's participation in the private party's activities." *Skinner*, 489 U.S. at 614.

In each case, as the Minnesota Supreme Court herein properly recognized, the "question can *only* be resolved in light of all the circumstances.' " *Skinner*, 489 U.S. at 614 (quoting from *Coolidge v. New Hampshire*, 403 U.S. at 487) (emphasis added). *Accord United States v. Koenig*, 856 F.2d 843, 847 (7th Cir. 1988); *United States v. Feffer*, 831 F.2d

734, 739 (7th Cir. 1987); *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981). Thus, the question presented is a factually specific one which, by its nature, makes it difficult to establish detailed criteria that can be broadly applied.

Even the non-Fourth Amendment case cited by petitioners, *Evans v. Newton*, 382 U.S. 296 (1966) (Petitions at 6-7), recognized the factually specific quality of resolving when private conduct becomes so governmental in nature as to be subject to constitutional limitation. In *Evans* this Court made it clear that:

> [G]eneralizations do not decide concrete cases. *'Only by sifting facts and weighing circumstances'* [citation omitted] can we determine whether the reach of the Fourteenth Amendment extends to *a particular case*. The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions.

Id. at 299-300 (emphasis added).

In the present case the Minnesota Supreme Court carefully engaged in sifting the facts and weighing the circumstances to conclude that the trial court, as the initial and primary finder of fact, was not clearly erroneous in holding the search herein to be a private one. *Buswell*, 460 N.W.2d at 620-21. Because of the factually unique nature of this case, no new or broad principles are presented for this Court to review. Therefore, the writ should be denied for failure to present a substantial federal question.

III. THE MINNESOTA SUPREME COURT CORRECTLY APPLIED THE PRINCIPLES SET BY THIS COURT FOR DECIDING WHEN PRIVATE SEARCHES ARE SUBJECT TO THE FOURTH AND FOURTEENTH AMENDMENTS.

As already mentioned, the basic test established by this Court for invoking the constitutional limitations in question is whether the private individuals conducting the search were acting as agents or instrumentalities of the state in light of all the facts and circumstances of the case. *Skinner*, 489 U.S. at 614; *Coolidge*, 403 U.S. at 487. This test was correctly stated and applied by the Minnesota Supreme Court to the unique facts of this case. *Buswell*, 460 N.W.2d at 618.

The record herein amply supports the findings below that no state agent, acting in that capacity, in any way ordered or instigated the search in question. The search was entirely by BIR's private security personnel acting under a private contract between BIR and North Country Security. The idea of conducting vehicle searches at the gate was BIR's in furtherance of its legitimate private interests. The only governmental contact was a general meeting held between BIR security and the Sheriff's Department at the beginning of the racing season. Although general problems (regarding what to do when BIR security uncovered illegal activity) were discussed, no orders or directions were given by any law enforcement agency as to when, how or why BIR would conduct its gate searches (O.H. 16-17, 26-27).

The record further supports the findings below that Mr. Emerson was not acting as a peace officer in the conduct of his private security business. He has no police

jurisdiction while on BIR property (which was outside Brainerd's city limits); and the limited scope of Emerson's special deputy status meant that he could not arrest anyone at BIR under that authority (O.H. 35). All of Mr. Emerson's actions as head of security at BIR were simply those of a private citizen. *Cf. United States v. McGreevy*, 652 F.2d 849, 851 (9th Cir. 1981). *See also* 1 LaFave, *Search and Seizure* (2d ed.) § 1.8(d), p. 207, ("[A] person who is a law enforcement officer for a public agency may, under certain circumstances when he is not on duty, be deemed to have been a purely private search because he was not at that time performing a governmental function.")

Because the holding below was plainly correct and amply supported by the record, there is no basis for granting certiorari herein.

IV. THERE IS NO CONFLICT WITH ANY DECISION OF THE FEDERAL CIRCUITS.

Petitioners erroneously claim that the holding of the Minnesota Supreme Court herein conflicts with various decisions of the federal circuits (Petitions at 9-10). They specifically cite *United States v. Feffer*, 831 F.2d 734 (7th Cir. 1987); *United States v. Luciow*, 518 F.2d 298 (8th Cir. 1975); and *United States v. Walther*, 652 F.2d 788 (9th Cir.).

However, the Minnesota Supreme Court not only analyzed each of these federal circuit court opinions for the factors they considered, but it also expressly recognized and applied those criteria as being "helpful" to its decision. *Buswell*, 460 N.W.2d at 618. When it came to considering the arguments in this case the Minnesota Supreme Court said that:

> We examine these arguments *keeping in mind the two factor Walther test* and watching for clear indices of significant government involvement which would convert the conduct of the BIR security force into government action.

Buswell, 460 N.W.2d at 619 (emphasis added).

Clearly, the decision of the Minnesota Supreme Court does not conflict at all with any of the decisions of the federal circuits.

CONCLUSION

For all the above reasons, respondent respectfully asks that the petition for a writ of certiorari be denied.

Respectfully submitted,

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